



STATEMENT OF

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BEFORE THE

SUBCOMMITTEE ON NATIONAL SECURITY, EMERGING THREATS AND
INTERNATIONAL RELATIONS

COMMITTEE ON GOVERNMENT REFORM

HEARING ON

“PRIVATE SECURITY FIRMS: STANDARDS, COOPERATION AND
COORDINATION”

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INTRODUCTION

Mr. Chairman, members of the Subcommittee, thank you for the invitation to testify today at your hearing titled “Private Security Firms: Standards, Cooperation and Coordination.” My name is Alan Chvotkin, and I’m the senior vice president and counsel for the Professional Services Council (PSC).

The Professional Services Council is the leading national trade association representing hundreds of companies of all sizes that provide professional and technical services to the federal government, including information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, and environmental services.

Several of our member companies provide security services to firms in Iraq, in the U.S. and around the globe. Some also have contracts directly with the U.S. government. As such, we know their concerns as service providers and have been working with them on a myriad of issues raised by their activities. In addition, many of our member companies are operating in Iraq pursuant to contracts awarded by numerous departments and agencies of the U.S. government; these firms are consumers of these security services and we have worked with them to highlight and address their concerns, as well.

PSC PARTNERSHIP WITH FEDERAL AGENCIES

Over the past several years, we have had extensive interactions with the Department of Defense, including the Offices of the Under Secretary of Defense for Acquisition, Technology and Logistics and the Assistant Secretary of the Army for Acquisition, Technology and Logistics and with the Army Materiel Command, who is the Defense Department’s lead service for Iraq. In 2004, we conducted an extensive “lessons learned” project with the Army Materiel Command staff with the support of and guidance from the former AMC Commander. We have worked closely with the Department of State, USAID and other agencies on their Iraq initiatives and their policies and practices affecting our member companies. Finally, we have partnered with the Special Inspector General for Iraq Reconstruction (SIGIR) on his comprehensive activities, including his three-part lessons learned project.

UNIQUE IRAQ SITUATION

Today, and almost from the outset of the Iraq war, we have seen unique activities in Iraq. Three types of operations are taking place concurrently, often in the same geographic space, in a country the size of California: (1) military actions; (2) reconstruction activities across ten critical sectors; and (3) developmental assistance. Hiring private security support is common for many of our companies who are routinely engaged in reconstruction and developmental assistance overseas, so Iraq is not new in that regard. However, it is obvious that Iraq has been and continues to be a very dangerous place to live and work, particularly for those individuals and organizations associated with the U.S. government. Thus, work in Iraq continues to present special issues and challenges because of the number of projects the U.S. government has contracted for and that are underway simultaneously; the number of contractors, contractor

employees and contractor facilities that simultaneously require private security support; and the evolving and often deteriorating security situation where the work is to be performed.

ROLES OF CONTRACTORS

Private contractors are playing critical roles in each of these concurrent operational areas. It would be impossible for the U.S. government, even with all of the coalition partners, to execute the number and scope of projects underway without contractors. But only for those contractors who are providing support to the military and are directly “accompanying the force” is the military even tasked with the responsibility for providing the necessary force protection for people and property. As such, private security firms (PSFs) are an essential adjunct to the U.S. companies executing all other contracts for U.S. government agencies. Of course, these private security firms are also employed by organizations in Iraq who are not under contract to the U.S. government; these may include firms supporting other coalition partners’ initiatives and non-governmental organizations.

The need for private security firms is also driven by the projects that are, of necessity, being undertaken by U.S. firms outside the green zone and other military-fortified areas. In fact, it is impractical for the military to provide force protection for all of these activities; some of the contractors don’t believe that they can effectively carry out their contractual work if the U.S. military is providing security support.

But the need for personal and perimeter security is vital and inescapable and the companies have an obligation to protect their personnel and their resources. Thus, these private security firms provide personal security for employees, housing locations and work sites. They coordinate and provide security for the transportation of key company personnel and resources and coordinate with government officials when their clients require interaction for official government business.

It is understandable why many of the sources and methods of these private security firms are confidential. By and large, it is our experience from our PSC member company firms’ that contracting for these security services have been sound and, more significantly, effective. However, the experience of our member companies, who are among the most sophisticated in the international reconstruction and developmental assistance communities, may not be typical of all firms who are contracting for security services in Iraq. Factors such as cost, availability, scope of the security responsibilities and others also factor into the decision of whether to contract for such services and from whom to obtain them.

To the extent possible, these private security firms also routinely seek to coordinate with the U.S. military on the overall security threat environment. Yet only recently has the U.S. government established reconstruction operations centers in Iraq that provide a formal channel for such coordination, on a voluntary basis. In fact, one of the key “lessons learned” from our Army Materiel Command effort was the fact that contractor force requirements were not integrated into the military planning process. Even within the military contracting process for contractors accompanying the force, where DoD policy dictates that the government contracting officer is required to validate any force protection requirements and provide that information to the geographic combatant commander, we found too many examples where that was not followed

and that the roles, numbers, and life support needs of those contractors accompanying the force were not fully addressed.

In light of these experiences, PSC worked with members of the House Armed Services Committee last year as they developed what became the “Contractors on the Battlefield Regulatory Act,” title 16 of the House-passed fiscal year 2006 National Defense Authorization Act (H.R. 1815). In our view, that title properly required the geographic combatant commander to plan and communicate with those contractors who are “accompanying the force” and to also reach out to those contractors “not accompanying the force” to share information about the threat environment and to communicate with both groups as much as possible. While this title was not enacted as part of the final conference agreement, the statement of managers accompanying the conference report (H. Rept. 109-360; 12/15/05) directs the Defense Department to review all relevant policy, guidance and instructions to address security issues raised by contractors not accompanying the force, and to specifically address five enumerated issues, including integrated planning and communication of relevant threat information. To date, we are not aware of any formal steps the Defense Department has taken to address these matters.

On May 5, 2005, the Defense Department finalized its “contractor accompanying the force” contract regulations (See 70 F.R. 23790, et seq.). In addition, on October 3, 2005, the Defense Department issued an internal instruction (DoD Instruction 3020.41) that establishes and implements policy and guidance concerning DoD contractor personnel authorized to accompany the U.S. Armed Forces (referred to therein as “contingency contracting personnel”). But more can and should be done.

As you know, since June 2005, the U.S. government has had diplomatic relations with the Government of Iraq. Some of these same private security firms provide their security services to the Department of State for itself and to fulfill the State Department’s responsibility to provide protection to other U.S. government employees in-country. Before the State Department had a formal role in Iraq, it is well known that Ambassador Bremer’s security detail at the Coalition Provisional Authority was provided primarily by a private security firm.

The number and scope of the projects in Iraq, the need to attract, retain and employ personnel who are “on their own” for force protection, and the highly variable security environment forced contractors to put a premium on hiring skilled, trained and well-managed security services. Thus, from almost the outset of this Iraq conflict, PSC has strongly recommended that the U.S. government (and in particular the Defense Department), adopt a non-traditional role with respect to private security firms.

In March 2003, PSC recommended to the senior acquisition leadership of the Department of Defense, through the Defense Acquisition Excellence Council, that DoD consider taking at least one of three initiatives: first, setting standards for the private security firms who wanted to operate in Iraq; or better yet, establish a qualified list of firms from which the private sector could contract directly for services needed; or even better still, that DoD directly contract for and supervise these private security firms that the contracting firms would reimburse. The essence of this recommendation was included in the Government Accountability Office’s (GAO) July 2005 report: “Rebuilding Iraq — Actions Needed to Improve Use of Private Security Providers (GAO

05-737; 7/28/05). Among the most vocal supporters for these standards is the industry leaders themselves. While U.S. government agencies raised valid reasons why they did not concur with these recommendations, there was a missed early opportunity for the government to address what we feared would become a significantly growing challenge.

THE IMPORTANCE OF ADVANCE PLANNING AND COORDINATION

Our lessons learned efforts with both the Army Materiel Command and the Special Inspector General for Iraq Reconstruction highlighted the lack of advance planning for the security needs of those U.S. government organizations responsible for non-DoD contracts to support either reconstruction or developmental assistance. The most significant portion of the State Department's December 22, 2004 revision to their acquisition regulation proposed new coverage requiring State Department contracting officers to address the administrative, logistical and security support to contractors performing overseas in "high-risk" activities.

The proposed rule was explicit that contract performance under Department of State contracts outside the United States "may be inherently dangerous" and that, unless specified in the contract, the contractor is responsible for all administrative, logistical and security support required for contractor personnel engaged in this contract."

While our members understand and accept the fact that they are responsible for these functions, PSC strongly opposed this portion of the State Department's initiative in our February 22, 2005 written comments (available on the PSC website at www.pscouncil.org) in part because the rule failed to provide necessary flexibility to address the real-world situations that were then obvious in Iraq and elsewhere. To date, the State Department has not taken further public action on our comments or on the proposed rule.

In-country coordination and communication is essential. It must be a two-way effort and there is every reason for the government to take advantage of the information that these companies have about the security situation in various parts of the country. Over time, despite the lack of any formal methodology or doctrine, many firms have created informal mechanisms to assist them in getting the job done as effectively and as efficiently as possible.

CONTRACTOR LIABILITY

Beyond the risk associated with these security arrangements, private security firms face significant legal challenges from third parties. Some of these cases arise out of the actions by contractors accompanying the force; others are the result of injuries suffered by others as a result of the security situation in Iraq. Each death is tragic and our thoughts and prayers go out to the families of all of those who have been injured or killed while supporting the U.S. activities in Iraq. We have tried to address this important liability issue from a variety of perspectives.

First, we looked at the current regulatory coverage for third-party liability while performing government contracts. PSC identified a problem with respect to third party liability arising from litigation brought in the United States based on acts or omissions of contractors supporting U.S. and Coalition forces overseas under fixed-price contracts. Third parties potentially subject to

inadvertent injury or death include host country citizens, third country nationals, personnel of other contractors, and even uniformed and civilian members of the U.S. and coalition forces.

Performing what may be considered routine work in the U.S. becomes significantly more dangerous and often uninsurable when performed overseas in a theater of operations. The Air Force recognizes this heightened risk in its published guidance regarding contractors accompanying a deployed military force:

Even if a contractor performs in accordance with the contract, the contractor may be vulnerable to claims that services in support of a war effort are inherently risky. Poor performance of systems support services (e.g., calibrating a weapon) could result in casualties or fatalities involving the military members using those weapons as well as unintended civilians. Air Force General Counsel Guidance Document Deploying with Contractors: Contracting Considerations, November 2003, at 9.

Under current circumstances, particularly in Iraq, commercial liability insurance is still often unavailable, insufficient or unreasonably expensive. In addition, many commercial policies often exclude “war risks” or risks associated with terrorist activities. Furthermore, as we know from PSC’s continuing work in this area, insurance companies are increasingly concerned about their ability to insure against the full range of risks associated with performing work in an area that is experiencing violent extremism against U.S. military forces, contractor personnel and the local citizenry. The increasing number of well publicized lawsuits filed in the U.S. by third parties against contractors alleging wrongful death support the concerns of both contractors and insurance companies.

If commercial liability insurance is insufficient, unaffordable or unavailable to contractors (and particularly to those performing fixed-price work) the number and quality of the contractors willing to accept such financial risks will decline. Boards of Directors, corporate officers, and audit committees -- particularly of publicly traded companies -- will decide that they cannot assume the full risk of a potential, catastrophic incident and may decline to pursue such work. As a result, the DoD will lack full access to the depth of experience and resources these contractors could otherwise provide.

Providing contractors with indemnification under Public Law 85-804 is an available solution, but that approach is viewed by many inside and outside of DoD as too burdensome or unpredictable, and certainly not consistently applied across a broad range of even related circumstances. Thus, while Public Law 85-804 remains a viable potential strategy to address the risk of third party liability under fixed price contracts on a case-by-case basis, we are not suggesting that DoD consider using that indemnification authority to address the concerns raised here.

We believe a less burdensome and more expedient remedy to address these liability concerns is to tailor the existing FAR clause to provide contractual indemnification under fixed-price contracts. As you know, contractors performing under *cost reimbursement* contracts are entitled to have included in their contract the clause at FAR 52.228-7 titled “Insurance – Liability to Third Persons.” That clause requires contractors to maintain a specified level of insurance and provides government indemnification for certain liabilities (and expenses incidental to such

liabilities) to third persons not compensated by insurance or otherwise. Since an increasingly large percentage of a contractor's cost is attributable to insurance and "reserves" for self-insurance, in these fixed price circumstances, it may be more economical for the U.S. to rely on its self-insurance through contractual indemnification for amounts not covered by a company's commercial insurance or otherwise.

On September 22, 2005, PSC sent a letter to Army Deputy General Counsel Levator Norsworthy recommending that the Army take the lead in pursuing a change to the Federal Acquisition Regulation to permit this tailoring. A copy of this letter is available on the PSC website at www.pscouncil.org.

In addition, on November 9, PSC and the International Peace Operations Association (IPOA) jointly filed a "friend of the court" brief with the 4th Circuit United States Court of Appeals in litigation relating to the scope of coverage of the Defense Base Act (DBA), a law that generally applies to all contractors working overseas in support of U.S. government activities. A lower federal court ruled that state law may apply to hold contractors liable for compensation for injury or death of company employees working overseas while performing these government contracts. In submitting this brief, PSC and IPOA called the Court's attention to the broad federal interests involved in the case. In particular, the brief highlights (1) the U.S. military's expanded use of contractors in support of the U.S. military operations overseas; (2) the critical services provided by those contractors; (3) the life-threatening risks faced by such contractors; (4) the legislative purpose behind the Defense Base Act, 42 U.S.C. § 1651 *et seq.*, to provide exclusivity, uniformity, and certainty in the availability of compensation to employees of contractors injured or killed overseas; and (5) the adverse impact on the Commander-in-Chief's ability to rely on contractors to support combat operations if any uncertainty arises in connection with the DBA's exclusive liability provisions. A copy of this amicus brief is also available on the PSC website at www.pscouncil.org.

Finally, David Hammond, an attorney at PSC member company Crowell and Moring, addressed a directly related issue of the appropriate forum for resolving litigation that arises in these cases. His Legal Background article, "Holding Contractor Battlefield Contractors Accountable," was published by the Washington Legal Foundation on April 7, 2006. A copy of that article is available at <http://www.wlf.org/upload/040706LBHammond.pdf>.

CONCLUSION

Hiring private security is common in overseas operations. Iraq is not new in that regard. However, the magnitude of the work, the concurrent operations taking place and the almost unprecedented security environment create unique challenges. But "solutions" must be approached carefully and with full consultation to address real issues without creating new problems. PSC would welcome the opportunity to work with the Subcommittee and others on these important policy matters.

Thank you for the opportunity to provide this information. I would be pleased to respond to your questions.

STATEMENT REQUIRED BY HOUSE RULES

In compliance with House Rules and the request of the Subcommittee, in the current fiscal year or in the two previous fiscal years, neither I nor the Professional Services Council, a non-profit 501(c)(6) corporation, has received any federal grant, sub-grant, contract or subcontract from any federal agency.

BIOGRAPHY

Alan Chvotkin is Senior Vice President and Counsel of the Professional Services Council, the principal national trade association representing the professional and technical services industry. PSC is known for its leadership in the full range of acquisition, procurement, outsourcing and privatization issues.

Mr. Chvotkin joined PSC in November 2001. He draws on his years of government and private sector procurement and business experience to facilitate congressional and executive branch knowledge of and interest in issues facing PSC's membership. Previously, he was the AT&T vice president, large procurements and state and local government markets, responsible for managing key AT&T programs and opportunities. Earlier at AT&T, he was vice president, business management, responsible for the government contracts, pricing, compliance and proposal development organizations. From 1986 to 1995, he was corporate director of government relations and senior counsel at Sundstrand Corporation. Mr. Chvotkin also was a founding member of industry's Acquisition Reform Working Group.

Before joining Sundstrand, Mr. Chvotkin spent more than a dozen years working for the U.S. Senate. He first served as professional staff to the Senate Budget Committee and to the Senate Governmental Affairs Committee. He became counsel and staff director to the Senate Small Business Committee, and then counsel to the Senate Armed Services Committee.

He is a member of the Supreme Court, American and District of Columbia Bar Associations. He is also a member of the National Contract Management Association and serves on its national board of advisors and as a "Fellow" of the organization. Alan is also a "Fed 100" winner. He has a law degree from The American University's Washington College of Law, a master's in public administration and a bachelor's in political science.